2723 South State Street. Suite,
150 Ann Arbor MI 48104
Tel: +1 (866) 534 6177 (Toll free)
Email: serv e@nora.legal
Website: ora.le al

RESEARCH MEMORANDUM

To:

From: Nora.Legal

Date:

Re: Idaho liquor license revocation

QUESTION PRESENTED

Whether a party subject to penal in an administrative decision has any recourse when the statute of limitations for n appeal has run.

SUMMARY

A party subjec to su h a penalty has recourse only under extraordinary circumstances either by way a pr ate tor action or a suit under 29 U.S.C. Sec. 1983. Idaho statues do not provide any such recours for a party subject to penalty under an administrative decision apart from a atutory review or appeal within the specific time. In Idaho, a violation of any of the provisions of t e terms and conditions of granting liquor license by a licensee or its agent, empl yee, servant, or other person acting on behalf of the licensee, in any way is presumed to be a violation by the licensee. Even though Idaho Administrative Procedure Act provides for judicial review of final agency action, an agency's factual determinations are binding upon a

reviewing court, even where there is conflicting evidence. A party challenging an Idaho agency decision must demonstrate that the agency's decision was erroneous and a substantial right of that party has been prejudiced. An agency's actions may be considered as arbitrary d capricious if made without a rational basis, or in disregard of the facts and i umstances, without adequate determining principles. But the reviewing court may not sub titute its judgment for that of an agency when it acts within the bounds of its discret on. An abuse of discretion occurs if the agency's actions are arbitrary, capricious or unreas nable. Furth , an agency's discretionary power would be limited by the statute and no other reco may be available apart from the statutory review or appeal on an agency's fin l de ision. A ditionally, the party is considered to have fully exhausted the administrative remedy b ore filing for a judicial relief. However, the respondent may file a civil conspi cy suit against the individual members of the ABC for their illegal acts causing damages to respondent, or a civil rights suit under 29 U.S.C. Sec. 1983 against the Board Memb rs in th ir official capacities for deprivation of civil rights under color of law.

Brief facts:

The matter relates an administrative action brought against respondent [redacted] LLC pursua t to the pro isions of Title 67, Chapter 52 of the Idaho Code. Bureau of Alcohol Beverage Co trol (ABC) a state entity authorized to enforce and police the Idaho Liquor Act is the compla ant. [redacted] LLC was holding a license to sell beer pursuant to Idaho Code §23-1010, and liquor by the drink pursuant to Idaho Code § 23-903. [redacted] LLC's liquor license was used in the restaurant for [redacted] As per the administrative decision, pursuant to a management agreement all [redacted] does to earn its fee is allow [redacted] dba [redacted] the

privilege of using its liquor license. Administrative violation notices were issued on 2009 and 2010 based on the fact that a licensee must be the bonafide owner of the business engaged in the sale of alcoholic beverages.

A complaint was filed before ABC for revocation of respondent's Al hol Beverag License for violation of Idaho Code §§ 23-905, 23-908(1), 23-908(4), and 23 1010(2)(a). ABC held that the respondent has not met the requirements of the statu es in terms of ownership, use and transfer of a liquor license and so has failed to comply with C. §23-908 1) & (4). ABC determined that respondent is disqualified because it di not place the ense into use in the first six months as required under the statute, and then tran ferred the use of the license before two years violating §23-908 (4). Also, the respondent was not th bonafide owner of [redacted] Respondent filed for review before the District Court. The district court considered whether a substantial right of the petitioner has been prejudiced warranting further judicial review. The district court affirmed agency's de ision to voke the liquor license issued to [redacted] LLC on May 1, 2012. Respondent failed to ring a timely appeal from the district court's decision.

The memo explores an further option available to the respondent under the circumstances.

RESEARCH FINDINGS

Introductio - Idaho liquor license.

As arly as in 1951, the Supreme Court of Idaho has stated that they "need cite no au hority for the proposition that the selling of intoxicating liquor is a proper subject for control and regu tion under the police power." Gartland v. Talbott, 72 Idaho 125, 131 (1951). According to the Supreme Court, "[i]t is likewise universally accepted that no one has an

inherent or constitutional right to engage in the business of selling or dealing in intoxicating liquors." Id. (citing Mix v. Board of Commissioners, 18 Idaho 695 (1910); 30 Am. Jur., Intoxicating Liquors, §§ 19, 20, and 22; 48 C.J.S., Intoxicating Liquors, §§ 20, 39). The court further held that "a proper exercise of the police power may result in discrim ation." Id. license may be granted to one and denied to another, even where both are equ lly qualified to exercise the privilege afforded by the license." Id. "But such inequality is unavoi able . . . where it is found in the public interest to limit the number permitted to engage in such business." Id.

Idaho Administrative Procedure Act.

"The Idaho Administrative Procedure Act pro ides hat "'[a] person aggrieved by final agency action other than an order in a contested case is entitl d o judicial review....'" BV Beverage Co., LLC v. State, 155 Idaho 624, 627 315 P.3d 12, 815 (2013) (quoting I.C. § 67–5270(2)). "Judicial review is available to aggrieved persons if they comply with I.C. §§ 67–5271 to 67–5279. I.C. § 67–5270(2)." Id

"In Logan v. Zimme man Bru h Co., the U.S. Supreme Court held that where a system deprives a person of a property right without adequate procedural safeguards, that system is unconstitutional." Id. at 6 7 (citing Logan, 455 U.S. 422, 432, 102 S.Ct. 1148, 1155 (1982). "While a lic nse to oper e a beer parlor or a billiard or pool hall does not confer any vested property righ yet if the c ty makes such businesses lawful by a permit or license, it cannot arbitrarily, apriciously, or unreasonably impair, interfere with, or eradicate the same." O Connor v. City of Moscow, 69 Idaho 37, 44, 202 P.2d 401, 405 (1949).

Review of Administrative Agency's decision.

The Supreme Court of Idaho "reviews an agency's decision independently of the district

court's appellate decision." Staff of Idaho Real Estate Comm'n v. Nordling, 135 Idaho 630, 633 (2001) (citing Price v. Payette County Board of County Comm'rs, 131 Idaho 426, 429 (1998)). "The agency's factual determinations are binding upon this Court, even where there conflicting evidence, so long as the determinations are supported by substantial comp e t evidence in the record." Id. (citing Price, 131 Idaho at 426).

> The Commission's disciplinary decisions may only be overturned where substantial rights of the appellant have been prejudiced and where ts f dings: (a) violate statutory or constitutional provisions; (b) exce d the agency statutory authority; (c) are made upon unlawful procedu e; (d) re not s pported by substantial evidence in the record; or (e) are arb trary, caprici , or an abuse of discretion.

Id. (citing Price, 131 Idaho at 426; I.C. § 67-5279(3) and 4)).

In State ex rel. Richardson v. Pierand zzi, 117 Idaho 1, 784 P.2d 331 (1989) the Supreme Court of Idaho addressed an issue involving "the re ocat on of a liquor license by the Department of Law Enforcement " Staff of Idaho Real Estate Comm'n, 135 Idaho at 637. "The revocation hearing was conducted by an xaminer who was paid according to how many cases he heard." Id. "The appe lants rgued t eir due process rights were violated because the examiner was predispo ed t rule in favor of the Department in order to attract future cases." Id. The Supreme Court r jected is argument finding that the "'potential for bias is cured by the fact that the parties have e right to judicial appeal of any administrative decision manifesting an abus of dis tion ' Id. (quoting State ex rel. Richardson v. Pierandozzi, 117 Idaho at 4). A cording to t court, because the appellants "had presented no evidence of actual bias . . . there were no grounds for finding a due process violation." Id.

Challenging an Idaho Agency Decision.

In Idaho, "[i]t is well established that the party challenging an agency decision must

demonstrate the agency erred in a manner specified in I.C. § 67–5279(3) and that a substantial right of that party has been prejudiced." State Transp. Dep't v. Kalani-Keegan, 155 Idaho 297, 300, 311 P.3d 309, 312 (Ct. App. 2013) (citing Wheeler v. Idaho Dep't of Health & Welfare, 147 Idaho 257, 260, 207 P.3d 988, 991 (2009). "Therefore, an agency's decisio y be affirm d solely on the grounds that the petitioner has not shown prejudice to a substant l right. Id. In other words, the courts may forego analyzing whether an agency rred in a mann r specified by I.C. § 67–5279(3) if the petitioner does not show that a substan al right was v olated." Id. (quoting Hawkins v. Bonneville Cnty. Bd. of Comm'rs 151 Idaho 22 32, 254 P.3d 1224, 1228 (2011)).

In Lane Ranch P'ship v. City of Sun Valley, 145 I h 87, 175 P.3d 776 (2007), the Supreme Court held that "[a] city's actions are c nsidered bitrary and capricious if made without a rational basis, or in disregard of the facts and circumstances, or without adequate determining principles." Id. at 91 (iting E rprise, Inc. v. Nampa City, 96 Idaho 734, 739, 536 P.2d 729, 734 (1975). Acco ding to th court, it "will not substitute its judgment for that of a city when it acts within th bounds of its discretion." Id. (citing Enterprise, Inc., 96 Idaho at 739). "A city's actions are consider an abuse of discretion when the actions are arbitrary, capricious or unreasonabl ." Id. (citing Enterprise, at 739).

Failure to timely file a petition for judicial review.

"P suant to Rule 84(n), the failure to timely file a petition for judicial review 'shall be ju isdictional and shall cause automatic dismissal of the petition for judicial review.'" Canyon Cnty. Bd of Equalization v. Amalgamated Sugar Co., LLC, 143 Idaho 58, 62, 137 P.3d 445, 449 (2006) (quoting I.R.C.P. 84(n).

The district court in City of Eagle v. Idaho Dep't of Water Res., 150 Idaho 449, 451, 247 P.3d 1037, 1039 (2011), dismissed Eagle's appeal as untimely pursuant to the decision in Erickson. In Erickson v. Idaho Bd. of Registration of Professional Engineers and Pr fessional Land Surveyors, 146 Idaho 852, 203 P.3d 1251 (2009). In City of Eagle, th p tition for judi ial review was filed more than twenty-eight days after the agency issued its order denying the motion for reconsideration but within twenty-eight days of servic . Id. at 451. Th Erickson court explained that "I.C. § 67–5273 'requires that if reconsideration f the final or er is sought, the petition for judicial review must be filed within twenty ight days aft he decision on the reconsideration.'" Id. (quoting Erickson, at 854). The Erick on court "dismissed the appeal and held that the twenty-eight-day appeal period began on the day that the agency issued the order on reconsideration, which was the day the order on econsider tion was signed and dated, not the day on which it was served." Id. (citing Erickson, at 853–54).

Availability of administrative remedy o r than statutory appeal.

The research did not show any uch specific administrative relief in situations where an appeal time has expir d. ID Code § 67-5273 (2013) provide for time for filing petition for review. The provision sta s that "[a] petition for judicial review of a temporary or final rule may be filed at a y time, exc pt as limited by section 67-5231, Idaho Code." ID Code § 67-5273 (2013). How ver, a petiti n for judicial review of a final order must be filed within twenty-eight (28) days of the service date of the final order. ID Code 67-5273 (2). But in the instant case, the st utory time for filing an appeal on the revocation of license has been already expired. In Dern v. Olsen, 18 Idaho 358, 110 P. 164 (1910), the Supreme Court of Idaho considered whether an administrator could waive the bar of the statute of limitation. The court noted:

> A number of authorities have been cited on this question, and we are aware that a great many courts have held that the administrator may waive the bar of the statute of limitations. That seems to be the general rule in England. These cases, however, rest upon statutes very different from ours. We do not find such a holding from any court where they have statutes the same as or similar to those above qu ted, *See* 2 Woerner's Law of Administration, § 401; Hanson v. Towle, 19 Kan. 282 Bank; of Montreal v. Buchanan, 32 Wash. 480, 73 Pac. 482; Estat of Claghorn, 181 Pa. 600, 37 Atl. 918, 59 Am. St. Rep. 680.

Id.

"An agency's findings of fact will stand if supported by substantial nd competent, although conflicting, evidence in the record.'" Williams v. Idah State Bd. of Real Estate Appraisers, 157 Idaho 496, 337 P.3d 655, 661 (2014) (quoting Jasso amas Cnty., 151 Idaho 790, 793, 264 P.3d 897, 900 (2011). "As to review of discr tionary i sues, 'an appellate court reviewing agency actions under the [IDAPA] must determin whether the agency perceived the issue in question as discretionary, acted within t outer limits of its discretion and consistently with the legal standards applicable to the available cho ces, and reached its own decision through an exercise of reason.'" Id. (quotin Haw Idaho State Bd. of Med., 143 Idaho 51, 54, 137 P.3d 438, 441 (2006).

Moreover, it has been held in a case where revocation of insurance agent's license that "[t]he selection of admini rative sanctions is vested in the agency's discretion." Knight v. Dep't of Ins., 124 daho 645, 650, 862 P.2d 337, 342 (Ct. App. 1993) (citing Pence v. Idaho State Horse Racin Commission, 109 Idaho 112, 116, 705 P.2d 1067, 1071 (Ct.App.1985). However, according t the court, "that discretion is limited by statute." Id. Therefore, it has to be co cluded that an agency may not have any discretionary power, apart from the discretion limited by the statute, to provide recourse to a party subject to penalty if the statutory appeal time has lapsed.

Additionally, a motion for relief from judgment under I.R.C.P. 60(b) does not limit the power of a court to) entertain an independent action to relieve a party from a judgment, order or proceeding. However, such a motion should be filed within one (1) year after judgm nt was entered. "Although the time when some actions must be taken can often be e larged by the district court *sua sponte*, the time requirement set forth in Rule 60(b) is jurisd tional and may not be extended 'except to the extent and under the conditions st ted' in th Rule tself." Miller v. Haller, 129 Idaho 345, 348, 924 P.2d 607, 610 (1996) (citing R.C.P. 6(b))

"I.R.C.P. 59(a) authorizes an aggrieved party to make a motio r a new trial on one of several specified grounds." Kuhn v. Coldwell Banker Landmark, Inc., 150 Idaho 240, 247, 245 P.3d 992, 999 (2010). "All motions for a new trial under I.R C P 59(a) must be filed within fourteen days after the entry of judgment." Id. 2 7-48 (citing Idaho R. Civ. P. 59(b)). However, "[a] trial court acts within its discretion in denying an untimely motion for new trial." Id. (citing Johannsen v. Utterbeck, 146 Idaho 423, 42 196 P.3d 341, 347 (2008)).

Furthermore, it should be noted that "[e]xhaustion of administrative remedies generally 'requires that the case run the ull gamut of administrative proceedings before an application for judicial relief may be con dered.'" Petersen v. Franklin Cnty., 130 Idaho 176, 185, 938 P.2d 1214, 1223 1997) (quot ng Grever v. Idaho Tel. Co., 94 Idaho 900, 903, 499 P.2d 1256, 1259 (1972). A m tion for reli f from judgment or other similar reliefs may not be applicable in the instant case scenario.

Other possible remedy that may be available to the respondent includes a civil conspiracy suit agai t the individual members of the ABC. Another remedy may be to file a civil rights suit under 29 U.S.C. Sec. 1983 against the Board Members in their official capacities for deprivation

of civil rights under color of law.

Civil Conspiracy against Individual Members of the Board.

"A civil conspiracy that gives rise to legal remedies exists only if there is an agreement between two or more to accomplish an unlawful objective or to accomplish a lawful object v in an unlawful manner." McPheters v. Maile, 138 Idaho 391, 395, 64 P.3d 317, 321 2003) (citing Kloppenburg v. Mays, 60 Idaho 19, 27–28, 88 P.2d 513, 516 (19 9)). How ver, [c]ivil conspiracy is not, by itself, a claim for relief." Id. (citing Argon ut Ins. Co. v White, 86 Idaho 374, 379, 386 P.2d 964, 966 (1963)). "The essence of a ause of actio r civil conspiracy is the civil wrong committed as the objective of the conspir y, n t the con piracy itself." Id. "An agreement is the foundation of a conspiracy charge and there m st be some showing of specific evidence of a plan or agreement to defraud to de onstrate he pendency of the conspiracy at the time the alleged fraud occurred." Mannos v. Moss, 143 Idaho 927, 935, 155 P.3d 1166, 1174 (2007) (citing Calvin v. Salmon River She Ranch, 104 Idaho 301, 304, 658 P.2d 972, 975 (1983)). "The gist of a civil ction for onspiracy is the act or acts committed in pursuance thereof, the damage, not the conspiracy or the combination." Argonaut Ins. Co. v. White, 86 Idaho 374, 379, 386 P.2d 64, 966 (1963).

In th instant cas it can be alleged that the injury (revocation of license) resulted from acts (by poli cal influenc) done in pursuance of the conspiracy committed by the individual members o the Board. However, the evidence must show specific evidence of a plan or ag ement between the Board members to commit the damage.

29 U.S.C. Sec. 1983 Against the Board Members in their Official Capacities- Deprivation of Civil Rights Under Color of Law.

"Section 1983 provides a cause action against every person 'who, under the color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects [another] perso . to the deprivation of any rights, privileges, or immunities secured by the Constitut n.... gland v. Ada Cnty., 154 Idaho 900, 908, 303 P.3d 587, 595 (2013), reh'g deni d (July 8, 013), cert. denied sub nom. Hoagland v. Ada Cnty., Idaho, 134 S. Ct. 1024, 188 L. Ed. 2d 119 (2014) (quoting 42 U.S.C. § 1983). "'[T]he § 1983 cause of action, by vi tue of the tatute's express language, is a personal cause of action, actionable only by per ons whose civil rights have been violated.'" Id. (quoting Evans v. Twin Falls Cnty., 118 Id ho 210, 217, 796 P.2d 87, 94 (1990)) (original emphasis). "In § 1983 cases, plaintiff bears the burden of proof on the [c]onstitutional deprivation that underlies the claim, and must come forward with sufficient evidence to create a genuine issue of material fact . . " Id at 907. "Section 1988 provides that § 1983 actions should be exercised in accordance with fed ral l ws." Id. at 908 (citing 42 U.S.C. § 1988). "But in situations where federal aw is eficien the common law or statutes of the forum state shall govern, so long as they are 'not inconsistent with the Constitution and laws of the United States.'" Id. (quoting 42 U.S.C § 1988).

"Th U.S. Suprem Court has held that 'a plaintiff [to state a § 1983 claim,] must allege the viol tion of right ecured by the Constitution and laws of the United States.'" Id. at 910 (uoting West Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254–55, 101 L.Ed.2d 40, 49 (1988)). "Beca se § 1983 is not a source of substantive rights, but merely a vehicle to vindicate those rights, '[t]he first step in any such claim is to identify the specific constitutional right allegedly infringed.'" Id. (quoting Albright v. Oliver, 510 U.S. 266, 271, 114 S.Ct. 807, 811, 127 L.Ed.2d

114, 122 (1994)).

Further, Idaho Supreme Court has held that "[w]hen deciding whether an individual's constitutional rights have been violated, this Court must independently decide wheth r the facts on the record show a violation of the fundamental constitutional rights at i " Bradbury Idaho Judicial Council, 136 Idaho 63, 67-68, 28 P.3d 1006, 1010-11 (2001)). Thu , in a civil rights suit, the court independently decides whether the facts on r cord show a vi lation of rights at issue. As aforesaid, a license to operate a beer parlor or a bill rd or pool ha l does not confer any vested property right, but if the agency makes such usinesses la by a permit or license, it cannot arbitrarily, capriciously, or unreasonably imp ir, i terfere with, or eradicate the same. Thus the respondent may file a civil rights suit against ABC for arbitrarily and unreasonably interfering with his right to conduct a lawful bus ness.

CONCLUSION

No case law or provision s ting an dministrative authority's discretion to waive a statute of limitation was fou d. More er, it is to be understood that any discretion of administrative agency would b limited by the statute and no other recourse is available under the situation. Additionally a motion for relief from judgment or a motion for new trial is not an option here s the time l mit has already expired as discussed above. However, the respondent may file a ci il conspirac suit against the individual board members of the ABC if it is possible to show sp ific evidence of a plan or agreement between the board members to cause damage to re pondent. Also, a civil rights suit against ABC board members in their official capacity is also an option for arbitrarily and unreasonably interfering with respondent's right to conduct a lawful business.